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In The

Supreme Court of the United States

October Term, 1983

No.

GURN H. FREEMAN

Petitioner,

vs.

UNITED STATES ex. rel. Miles

Respondent.

PETITION OF WRIT OF HABEAS CORPUS TO THE SUPREME COURT OF THE UNITED STATES

Gerald D. Freeman
4755 N. Washtenaw
Chicago, Illinois 60625

GROUNDS FOR WRIT OF HABEAS CORPUS

1. Appellant's right to the *due process of law,* wherein the Government seeks to deprive him of his liberty, was denied when the reviewing panel premised his guilt upon non-existent, totally false "facts" instead of addressing the "actual" evidence contained in the official trial record, e.g., contrary to the Unpublsihed Opinion, page 1-2, Jenkins, one of the named fourteen "alleged victim" witnesses, *did not* testify to Appellant misrepresenting Century could fund Jenkins' business, but instead, the official trial record of Jenkins' actual testimony on direct examination reflects (TR 473-74):

> **Q.** And I realize it's been a long time, sir, but are you able to recall what Mr. Freeman said to you during the discussions?
>
> **A.** No.

2. Appellant's right to the *due process of law,* wherein the Government seeks to deprive him of his liberty, was denied when the reviewing panel did not test the sufficiency of the evidence as to each individual count to wit the jury found Appellant guilty, e.g., Count 1, Jenkins not shown to be defrauded by misrepresentations of Appellant, *supra*--Jenkins paid Century $500 to produce a joint venture business plan calling for Jenkins to raise $15,000 (X-105-09) which he acknowledged receiving (TR 475-76) and being informed of such duty (TR 485-86) and he raised all $15,000 and never returned to Century (TR 476); neither the conduct of business nor the mailing constitutes a violation of the Federal Mail Fraud Statutes, 18 U.S.C. § 1341.

3. Appellant was denied the right to a full and fair review of the "actual" evidence and effectively was denied the fruits of his sixth amendment right to confront and cross-examine his accusers (i.e., Jenkins, *Supra*) when the reviewing panel prejudicially substituted non-evidentiary Government argument instead of applying the actual testimony and exhibits to each respective count in the Indictment.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
CONSTITUTIONAL PROVISIONS, STATUTES AND OTHER LEGAL AUTHORITIES	iii
OPINION BELOW	v
JURISDICTION	vii
STATEMENT OF THE CASE	1
ARGUMENT	2
SUMMARY	28
CONCLUSION	30
APPENDIX A, OPINION OF COURT BELOW	A, 1-10
APPENDIX B, JUDGEMENT AND ORDERS ON REHEARING	B, 1-5
APPENDIX C, THE INDICTMENT	C, 1-14

TABLE OF AUTHORITIES

Cases:	Page
McNabb v. United States, 318 U.S. 332 (1943)	30
Other Legal Authorities:	
Amendment V, U.S. Constitution	v,30
Amendment VI, U.S. Constitution	v,30

Title 18, Chapter 63—Mail Fraud, '1341. Frauds and swindles, p.4301, U.S.C.A.

' 1341. Frauds and swindles.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security,or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. (June 25, 1948, ch. 645,62 Stat. 763; May 24, 1949, ch. 139, § 34, 63 Stat. 94; Aug. 12, 1970, Pub. L. 91-375, § (6)(j)(11), 84 Stat. 778.)

Title 18, Chapter 113—Transportation of stolen goods, securities, money, fraudulent State tax stamps, or articles used in counterfeiting, § 2314, p. 4371, U.S.C.A.

§ 2314. Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting.

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country. (June 25, 1948, ch. 645, 62 Stat. 806; May 24, 1949, ch. 139, § 45, 63 Stat. 96; July 9, 1956, ch. 519, 70 Stat. 507; Oct. 4, 1961, Pub. L.87-371, § 2, 75 Stat. 802; Sept. 28, 1968, Pub. L. 90-535, 82 Stat. 885.)

Title 18, Chapter 19—Conspiracy, §371. Conspiracy to commit offense or to defraud United States, p. 4190-91, U.S.C.A.

§ 371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. (June 25, 1948, ch. 645, 62 Stat. 701.)

Title 18, Chapter 1—Principals, § 2, p. 4151-52, U.S.C.A.

§ 2. Principals.

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. (June 25, 1948, ch. 645, 62 Stat. 684; Oct. 31, 1951, ch. 655, § 17b, 65 Stat. 717.)

Amendment V, Constitution

"No person shall be held to answer for a capital, or otherwise infamous crime . . . be deprived of life, liberty, or property, without due process of law . . ."

Amendment VI, Constition

In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him.

PROCEEDINGS IN THE COURT BELOW

This criminal action was commenced on 7/8/80 by the United States of America, in the United States District Court for the Western District of Michigan, Southern Division, against petitioner, Gurn H. Freman, Sr. Petitioner was convicted of devising scheme or artifice to defraud by use of U.S. mails; aiding and abetting. *Counts 1, 2, 3, and 4;* 18 U.S.C. § 1341; 18 U.S.C. § 2 (a). Transportation in Interstate Commerce of securities obtained by fraud; aiding and abetting. *Count 7;* 18 U.S.C. §2314; 18 U.S.C. § 2 (a). Conspiracy to defraud the United States; aiding and abetting. *Count 8;* 18 U.S.C. § 371; 18 U.S.C. § 2 (a). Petitioner was acquitted of causing to be transmitted in interstate commerce by means of a wire communication for the purpose of executing the aforementioned scheme and artifice. *Counts 5 and 6;* 18 U.S.C. § 1343; 18 U.S.C. § 2(a).

On 9/8/80, the District Court entered judgement finding the petitioner guilty of 18 U.S.C. § 1341; 18 U.S.C. 2314; 18 U.S.C. 2 (a); and 18 U.S.C. § 371 and sentenced him to imprisonment for five years as to each of Counts 1, 3 and 8, to run concurrently as to each of these Counts—as to Counts 2, 4 and 7, is to be placed on probation for five years to run concurrently upon release from confinement in a penal institution. Petioner was also fined $1,000 as to Count 3 and $10,000 as to Count 8.

Petitioner filed notice of appeal on 9/8/80. The United States Court of Appeals for the Sixth Circuit entered judgement on 10/1/82, affirming all Counts: 1,2,3,4,7 and 8.

The judgement sought to be reviewed was issued and entered on October 1, 1982; petition for rehearing *en banc* was sought and it was denied on November 24, 1982 and was reissued on December 9, 1982 and all of which are set forth in the Appendix as Appendix B. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § *1254 (1)*.

Petitioner filed a Writ of Certiorari to the Supreme Court of the United States on February 4, 1983. On April 18, 1983 the United States Supreme Court entered an order denying the petition for a writ of certiorari.

Petitioner filed a Petition for Rehearing on a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit on May 13, 1983. On June 13, 1983 the United States Supreme Court entered an order denying they aforementioned Petition for Rehearing. (Orders denying Certiorari and Rehearing on Certiorari are set forth in Appendix B)

Filed a Petition for a Writ of Mandamus with the Clerk of the United States Supreme Court on August 5, 1983 and on October 3, 1983, the Court ruled "The motion to direct the Clerk to file a petition for writ of mandamus is denied".

JURISDICTION

The relief sought in this petition for Writ of Habeas Corpus is directed to the attention of this Court because petitioner has sought review of the "merits" of such Unpublished Opinion being premised upon non-evidentiary matters in the Sixth Circuit upon rehearing en banc but such Circuit Court judges sitting en banc failed to acknowledge the obvious prejudicial acts of their associates in rendering the non-evidentiary findings in such Unpublished Opinion. Petitioner therefore does not believe any Federal judge sitting in the Sixth Circuit District could review such petition without prejudice to the subject matter therein. The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. § 2241.

APPLICATION FOR WRIT OF HABEAS CORPUS

Application for a writ of habeas corpus is being submitted pursuant to Title 28 U.S.C. § 2242 wherein Appellant submits Federal Judge Wendell A. Miles of the Western District of Michigan currently has custodial rights over him by virture of the prior decision of the trial jury and subsequent sentencing procedure for the alleged violations of the Federal Mail Fraud Statutes.

Appellant believes his application to the Supreme Court is necessary due to the nature and seriousness of the subject matter addressed in the petition. Furthermore, the manner in which Appellant's allegations of the reviewing panel lying about the actual testimony has not been received well by anyone in the Sixth Circuit of Appeals District.

STATEMENT OF THE CASE

Appellant is submitting the writ of habeas corpus because Judge Merritt's Unpublished Opinion, dated October 1, 1982, chose to premise the court's affirmation of guilt upon:

1. Misrepresentations of the official trial record--alleging non-existent testimony;
2. Ignoring the fact that proof is necessary to support guilt as to each specific count (i.e., Appellant "only" introduced to Clarks, court affirmed Counts 3 and 4);
3. Wholesale use of unsupported Government argument;
4. "Evidence" which was properly objected to and sustained by the trial judge; and
5. Generally, not being factually in command of the trial record, Government admissions gained via appellate briefs, and Appellant's breifs (misquoted by court).

The case before this Court is not a difficult case to comprehend and digest. The lower court made this case more difficult because it did not and would not discriminate between Government argument which misrepresented the evidence and the official trial record which clearly describes what relationship, if any, Appellant had with the named alleged victims and what oral and/or written representations were made, if any, to such named individuals. This case involves a written contract freely entered into and acknowledged by all seven clients Appellant met or had business discussions. Their testimony mirrored their agreement with Century to provide a limited offering business plan in exchange for all monies Century every received prior to the Fall of 1975 ["Business Divorce"--Appellant no longer associated with anyone (TR 1032-33)]. This business plan, according to the testimony and exhibits, *was not* represented by anyone to be produced for the stated purpose of obtaining financing for each client's business via Century fund raising efforts (Indictment, para. 3 and 4f). On the contrary, the clients knew and the Government admitted (Government's 2nd Reply Brief dated October 14, 1981, p. 23) that such limited offering business plans were produced pursuant to a written contract in exchange for all monies ever received and all limited offering business plans according to the contracts and testimony would have to be capitalized by the client. Moreover, the clients and the Government admitted (Government's 1st Reply Brief, dated Sept. 4, 1981, p. 21): "He did promise plans, and in fact did provide them." *Id.* How were these people defrauded out of such monies when limited offering business plans were contracted for and delivered for the monies received? Neither the Government nor the

lower court ever demonstrated by the official trial record, which was subjected to cross-examination, that Appellant made oral or written representations which he knew to be false when made.

ARGUMENT

APPELLANT'S ENTITLEMENT TO THE DUE PROCESS OF LAW GUARANTEES AN APPELLATE REVIEW BASED UPON THE EVIDENCE CONTAINED IN THE OFFICIAL TRIAL RECORD.

Petitioner is acutely aware of this Court's history of not hearing cases involving questions of sufficiency of evidence to support a jury's conviction and Appellant is also aware that a writ of habeas corpus is an extraordinary writ which commands an abnormal set of circumstances in order to justify issuance. The case before this Court involves an extraordinary set of circumstances which this Court under its broad supervisory powers not only has a right to set straight, but petitioner believes this Court is duty-bound to uphold the constitutional rights which were unduly trampled upon by the Sixth Circuit's Unpublished Opinion which projected Appellant doing many unlawful acts notwithstanding the simple fact that no testimony or documents exist which would support their non-evidentiary finding of guilt. Petitioner prays that what has occurred to him via the *lower court's misrepresentations* of evidence in their attempt to justify imprisonment is indeed abnormal and extraordinary.

The Constitution of the United States guarantees the accused the right to confront and cross-examine his accusers; the Unpublished Opinion (October 1, 1982) frustrates and otherwise negates such right by *substituting* the "alleged victims" actual testimony with unsupported argument which the lower court proclaimed to be "their" testimony. Appellant contends his entitlement to the *due process of law* was abridged when the Sixth Circuit appellate reviewing panel of Federal Judges Lively, Keith and Merritt *falsified* and/or otherwise *misrepresented* the testimony and exhibits produced at trial, specifically:

1. Judge Merritt, author of the "Unpublished Opinion" falsely stated that all alleged victims had testified that Appellant had falsely represented promises of funding "by" Century, specifically:

Judge Merritt claimed (Opinion, p. 1-2) that:

> "Fourteen 'victims' witnesses in need of 'venture capital' testified about Freeman's alleged 'scheme to defraud' them of money through false representations that Century Consultants could provide them with needed capital for expanding or recapitalizing their present business or starting new enterprises."

When in fact: The testimony Judge Merritt claimed exists simply does not exist:

a. Of the fourteen "alleged" victims named in the Indictment, four "post" Business Divorce clients[1]--***Alexander, Green, Bossee*** and ***Susnjara never*** testified at trial.

b. Three other "post" Business Divorce clients, "alleged" victims, ***Dawson*** (TR 255), ***Raleigh*** (TR 629-30) and ***Boeldt*** (TR 294-95) never provided such testimony either, they testified they had *never known* of Appellant.

c. The other seven "alleged victims" served prior to the Business Divorce testified as follows:

(1) ***Jenkins*** did *not* testify about "any" representations much less false representations as Judge Merritt said he did; Jenkins, on "direct" examination (TR 473-74):

> **Q.** And I realize it's been a long time, sir, but are you able to recall what Mr. Freeman said to you during the discussions?
>
> **A.** No.

Jenkins "knew" he had to raise the joint venture money because he was *told* he would have to (TR 485-86). Jenkins did not testify about a scheme to defraud as Judge Merritt said he did; Jenkins acknowledged receiving the typewritten joint venture plan (X-105-09) which calls for him to raise $15,000 in seed capital to wit he paid Century Consultants $500 (TR 486). Moreover, Jenkins testified he raised all $15,000 and never returned to Century (TR 476).

(2) ***Herbert's*** testimony is *totally void* of the false representations that Judge Merritt attributes to Appellant (TR 301-02):

---

1. Cooperating Government Witness Wagner provided "unrebutted testimony that in the fall of 1975 Appellant had completely severed all business affiliations and termed such severance a business divorce (herein "Business Divorce", TR 1032-33).

Q. Do you remember anything that Mr. Freeman said to you?

A. Not exactly, no. We just discussed the problems, and possible solutions to the problems.

Q. Now did there come a time when you had another meeting with Mr. Freeman?

A. Not until the very last time we went there.

Q. Do you recall approximately when that was, sir?

A. That would have probably been October, September, October, in that area of '74, I would believe. I'm a little vague on years. I am not sure.

Herbert, who contracted for nothing more than a limited offering business plan testified as to all that Appellant ever said to him prior to entring into the written contract (X-5-8), paying the fees and receiving his business plan (X-26-101). Herbert did not testify about a scheme to defraud through Appellant's alleged false promises of funding by Century as Judge Merritt had claimed. In fact, Herbert's testimony on "direct" examination contradicts what Judge Merritt claimed (TR 303):

Q. (Mr. Morse) Were you ever told by Mr. Freeman of Century Consultants that they would raise the money?

A. You're speaking of Sr?

Q. Mr. Freeman, Sr?

A. No.

Herbert's partner, Howard, on "direct" examination also testified contrary to Judge Merritt's claim (TR 343-44):

Q. Do you remember any of the discussions that were had during that meeting?

A. Yes. We talked about what -- what we needed the money for, how much money we needed, and *how we should go about getting the money.* (emphasis added)

Q. You say "we", are you talking about yourself and Mr. Herbert?

A. And Mr. Haney. (Herbert's third partner)

Herbert and his partner could not have contradicted Judge Merritt's rendition of their testimony in more specific terms. Herbert also testified that his lawyer was with him at Century Consultants' offices and *prior to paying any fees* his lawyer read the documents and Herbert himself had read the contract language

> ..."This capitalization plan would be designed so that a limited offering could be made by you and/or your officers and directors"

before he parted with any money (Tr 323-24). The acknowledged terms of Herbert's contract's also contradicts Judge Merritt's claim.

(3) *Henry Clark* did not support Judge Merritt's claim of Appellant's alleged false representations that Century could provide needed capital. On "direct" examination, Henry Clark testified about the only time he ever laid eyes on Appellant (TR 367-68):

Q. What occurred at that meeting, sir?

A. The -- when we immediately met them, we met in Mr. Humphrey's office. As I said Gurn Greeman stayed just a short period of time, just an acquaintance type of thing, and exchanged a few remarks. Then he left, and we -- Frank and I remained with Tom Wagner and Hubert Humphreys in Hugh's office for maybe a couple of hours.

Frank Clark testified likewise (TR 409-10). "Introductory remarks" and "making friends" do not amount to false misrepresentations that Judge Merritt said Clark testified to. The Clarks paid for a limited offering business plan and received it (TR 388).

(4) *Erbe* did not testify about Appellant making false representations that Century could provide needed capital; he could only recall Appellant's representations of successful funding by clients and not by Century (TR 97). Judge Merritt said Erbe, one of the fourteen alleged victims, testified as to false promises of funding "by" Century -- but such testimony by Erbe is non-existent.

(5) *Morgan* did not testify as to Appellant making false representations that Century could provide needed capital as Judge Merritt had claimed (TR 497-98):

Q. Let me show you Government Exhibit #1 (X-249-53), and ask you if that document explains the level.

A. This outlines the entire situation.

Q. (Mr. Morse) Would you please tell us then --

A. Well, Phase I *was for me to find $200,000* in -- by making an offering, if you will, to 20 investors for $10,000 a piece. *This was made clear to me before --before I parted with any money.* I feel that I am good enough salesman that I could get through that phase without too much trouble. (emphasis added)

Phase 2 and 3, however, were not in my opinion, something that I was going to be directly involved in.

Morgan's testimony does reveal that Century via Leigh Johnson, consultant of Century, did represent Century would seek Phase 2 and 3 monies after Morgan completed Phase I -- $200,000 limited offering (TR 497: Government Exhibit G-3, 4, 5). Each of the three offers of service outlined how Century would attempt to seek Phase 2 and 3. And Morgan understood *when* Century would have begun such performance under the future offers of service (TR 499):

> **Q.** What if anything did Mr. Freeman tell you?
>
> **A.** At early meeting I was told that -- that Century Consultants had the contacts, had enough backing to finance this kind of a project, and *that they would finance this project had we gotten* -- once I got through these first two phases. (emphasis added)

But Morgan never got through the first phase (TR 500) and furthermore, Morgan *never contracted* for the "secondary" (Phase II and Phase III) financing. Morgan merely *assumed* Phase 2 and 3 funding by Century (TR 498). Therefore, Judge Merritt clearly lacked an evidentiary basis upon which to conclude that Morgan, one of the fourteen victim witnesses, testified that Appellant made false representations that Century could fund Morgan's Phase 2 and 3.

(6) ***Webster*** did not testify about Appellant making false representations that Century could provide needed capital. Webster admitted the April 22, 1975 offer of services [the contract in evidence (F-36, X-230-34)] resulted from his first meetings with Century and was in fact the service promised to be performed for "the fees paid" (TR 763-64):

> **Q.** Now, Mr. Webster, the exhibit that I have handed you [F-36] dated April 22, 1975, is the exhibit that you drew out of your first conferences with Century Consultants, and was a basis upon which you employed them to be your consultant, is that not correct?
>
> **A.** Yes.

Webster tendered the $11,000 in fees, according to the contract, for nothing more than a seed capital and limited offering business plan involving $150,000 in Phase I capitalization and said agreement specifically advised Webster that "he" would have to obtain this seed capital and limited offering funding himself (X-232-33, para. 3 and 4d).

Webster physically demonstrated his understanding of the

contract that "told" him he had to raise his own $150,000. After receiving the business plan (X-136-215), Webster took this plan to his second attorney, Kerns (TR 748) to "explain to (Webster) how to protect (his) right to use the private or limited offering exemptions" as was advised in the contract (X-232, para 4d). Mr. Kerns prepared the limited offering circular called for in the business plan (TR 748). Webster thereafter sought to raise the limited offering capital (TR 753):

Q. Now sir, you then sold $25,000 worth of joint venture interest [seed capital]. I think you said 26,000 in your statement, but something in that area?

A. It was 25,000.

Q. And then you sold about $33, to $36,000 worth of stock on the *limited offering* to your people, is that correct? (emphasis added)

A. The people that wanted it, yes.

Q. The people that you knew, that you found?

A. Yes.

Webster, like Morgan, also wanted secondary financing (i.e., for construction of a shopping center) and on 6-9-75, eleven days after completing his payment under the *first* agreement, Webster entered into a *second* agreement calling for a "future performance" whereby Century would work as a "finder" to locate institutional sources of financing for a contingent fee of 5% (X-227-28) once Webster had successfully completed his limited offering, formed a new entity and prepared a new balance sheet as was made clear in Webster's contract. And Webster understood such Phase II-secondary financing was a *future performance*, "later down the road, that's what we discussed" (TR 649).

Government Witness Wagner also left no doubt that the "future" performance (contingent fee) contract for secondary financing was entered into on the condition (termed "absolutely necessary" in Webster's contract) that the client must first secure his original financing (seed capital and limited offering), (TR 960):

Q. And so you made it very clear to him that he had to go and get his part done before there was any chance of the finder's fee business being done, is that correct?

A. That's correct.

Q. Did Gordon Webster tell you, "well, yeah, I understood."

A. Yes.

Cooperating Government Witness Wagner also made it clear

that finders work to locate financial sources would have only been due as to Webster's *second* (contingent fee) contract (X-227-28), the $1,000,000 secondary financing (TR 889):

Q. Now if you know, Mr. Wagner, were these financial sources to help Mr. Webster in the $25,000 or the early stages [limited offering] of what?

A. No. The financial sources were to finance the project, the $1,000,000, the project itself, the building of the shopping center, construction of the center, construction loan.

Webster also testified as to his understanding of the contingent fee arrangement for Phase II-secondary financing -- if consultants don't find such sources for such financing, consultants get "nothing" (TR 771-72). However, Century Consultants was never called upon to locate any financing sources; Webster himself "foreclosed" any search for sources under this "future performance" contingent fee agreement (second agreement) when he failed to complete the sale of his "limited offering" (first agreement). Webster also admitted embezzling his shareholder's funds (TR 755) which would have again foreclosed any possibility of securing sources from any institution.

The written representations in the contracts, the testimony of both Webster and Wagner directly contradicts Judge Merritt's claim that Appellant made false representations that funding could be provided "by" Century.

(7) ***Edleman*** did not testify about Appellant making false representations that Century could provide needed capital as Judge Merritt claimed.

Edleman testified that before he paid any fees to Century, he came to Chicago with his attorney, Government Witness Conrad (TR 136-37). Conrad, Edleman and Appellant were present at the meeting which took place in early April (TR 122-23) and money hadn't changed hands until May 7 or 8 (TR 129).

Edleman's attorney, Conrad, testified that he reviewed the contract (Gov't Ex. I-11, X-293-98) and submitted his legal opinion to Edleman (TR 169-70):

THE WITNESS: Was the question, did I give an opinion? Yes I did give an opinion.

And Conrad also understood who was to raise the private offering called for in the Phase I business plan Edleman paid for (TR 176-77):

Q. ...It is our opinion that the best way to proceed with the

acquisition of this $250,000 is a private offering that would be made by the principals. (Edleman contract)

Now who was supposed to be the principals of Mr. Edleman's enterprise?

A. At that time, I don't think it was determined.

Q. Was Mr. Edleman supposed to be one of the principals?

A. Oh, certainly.

Q. Was Mr. Gurn Freeman supposed to be one of the principals? Be an owner of that business?

A. No, I don't believe so. I never heard anything of that sort, no.

Judge Merritt said Edleman testified as to false promises of funding "by" Century, but Government Witness Conrad testified that the "principal" (Edleman), not Appellant, was to raise the funds. Moreover, Conrad further testified about Appellant's oral representations (TR 169):

"The legal documents pretty much, as far as form is concerned, conform to the many conversations that we had that morning with Mr. Freeman"...

Edleman, like Webster, wanted Century to assist him with secondary financing after he would successfully complete his own seed capital and limited offering funding and Edleman's contract, which Conrad had rendered an opinion on, *Supra,* called for a "two" phase financing plan. *Phase I* consisted of two steps - $25,000 seed capital ("initial" step) and $225,000 (second step) limited offering and the contract specifically advised Edleman that all such Phase I financing had to be..."secured privately by yourself" and/or by the principals of Edleman's company and that the fees being tendered were for the Phase I comprehensive business plan; and *Phase II* consisted of $600-700,000 to be sought by Century Consultants for a contingent finders fee of 5% and this contract advised (X-296):

"4. With respect to Phase II and the subsequent capital of $600,000-$700,000:

After the $250,000 (limited offering) has been secured, the entity formed and a balance sheet prepared, the above-mentioned capital should be secured from venture capital firms. We would act as a 'finder' in the procurement of this $600,000 to $700,000 for finders fees hereinafter discussed."

With respect to Phase I, for which Edleman tendered all fees, Edleman, like his attorney, Government Witness Conrad, directly contradicted Judge Merritt's statement that Edleman testified that

he was promised funding "by" Century (TR 143):

Q. Now did Mr. Freeman in fact tell you that you had to raise your money in steps?

A. Yes.

Q. And he told you that first of all you should try and raise $25,000 as an *initial part* of the -- of your step plan, isn't that correct? (emphasis added)

A. That was what was carried in the papers, yes.

Q. Now you did raise that money, did you not?

A. No, I did not.

Edleman testified as to freely abandoning both Phase I-limited offering financing and Phase II-secondary financing (TR 149-50):

Q. And so when you decided not to, you just figured, I'm not going to have anymore to do with this deal. I'm going to do something else with my life. I'm not going to try to take over North American and Kelly Photo Labs, is that right?

A. I elected not to carry on with that deal.

Edleman's abandonment of the contract does not render Appellant's representations made thereto false merely because Century never attempted Phase II funding efforts for Edleman. Judge Merritt's claim of false representations of funding as to Edleman is without evidentiary support.

Not one of the alleged victims testified about Appellant making any false representations that "Century Consultants" could provide them with needed capital. Judge Merritt's Unpublished Opinion attempts to equate non-performance of secondary financing as a misrepresentation without reviewing the circumstances for such non-performance.

2. Judge Merritt falsely stated that "alleged victims" were obliged to raise *only* the "seed capital" portion of the funding and that all funding beyond the seed capital constituted secondary financing that was to be obtained by Century for a contingent fee, specifically:

Judge Merritt claimed (Opinion, p. 3):

"Should the client manage to raise the required ***seed capital,*** Century would then offer further services for obtaining the ***second larger phase*** of capital on a contingent fee basis." (emphasis added)

When in fact:

a. The "undisputed" contracts to wit all fees in question were

tendered by all clients served prior to the Business Divorce called for nothing more than the production of a *seed capital and/or limited offering* business plan and all contracts specifically advised that such funding was to be obtained "by" the clients, not Century (see schedule below):

Name of Alleged Victim	Financing Plan to be Developed for Fees Paid as Specified in the Contract	Total Fees Paid	Reference	Contract Exhibit No.
Jenkins	Seed Capital	$ 500	TR 486	Note (1)
Herbert	Limited Offering	5,000	TR 324	X-5-8
Clark	Limited Offering	3,500	TR 374	X-111-14
Erbe	Limited Offering	5,000	TR 101	X-289-92
Webster (Note 2)	Seed Capital & Limited Offering	11,000	TR 770	X-230-34
*Morgan	Limited Offering	5,000	TR 496	*Def Ex DG2
Edleman	Seed Capital & Limited Offering	5,000	TR 159	X-293-98

*Morgan's retainer letter was admitted into evidence at TR 508; it is in the record but it was inadvertently left out of the Appendix.

Note 1: Jenkin's contract was not introduced into evidence, however Jenkins' testimony confirms receipt of a joint venture plan (X-105-09) calling for Jenkins to raise $15,000 in seed capital and Jenkins testified that he raised all $15,000 called for in the plan (TR 476 & 486). As can be seen in Jenkins' joint venture plan, he had contemplated a limited (private) offering following his seed capital plan -- but Jenkins testified that he never returned to Century (TR 476)..."Because of the business consultant I had in Lansing" (TR 487).

Note 2: The Sixth Circuit's Opinion (p. 3) advises Webster paid..."fees totalling some $27,000 (TR at 729; Exhibits App. at 122-45)" -- However, these exhibits (itemized billings and cancelled checks) clearly show, by the dates and services performed that all such fees were for work "other" than the original business plan and all such other work was contracted for *after* the Business Divorce. Webster's testimony also confirms exactly what the documents in evidence demonstrate, e.g. -- that he had not (for the post Business Divorce work) paid..."all of these bills that you later paid them"...A. I paid them $11,000 (TR 770). -- e.g., $3500 retainer (TR 766) and $7500; X-244, the fees in question).

b. The "alleged victims," their attorneys that testified and Government Witness Wagner all testified that limited offerings were to be funded by the alleged victims not Century, *Supra.* The Government also admitted (Government's First Reply Brief, p. 28):

> "'Equity' financing was the 'limited offering' or 'seed capital' which the witnesses, at least some, indeed testified that they had to raise themselves..."

c. Thus the testimony, contracts, and Government admission conclusively demonstrate Century was not to raise limited offering capital on a contingent fee basis or upon any other basis.

d. Contingent fee financing was only contracted for by Webster (his second agreement, *supra*) and by Edleman for his Phase II financing, *supra* -- but Century's offer to work as a finder for such contingent fee financing did *not* follow the seed capital financing -- all evidence, testimony *supra* and contracts *supra* clearly demonstrate that these alleged victims' contingent fee financing was to follow the successful conclusion of their "limited offering," *not* their seed capital financing as Judge Merritt so stated. There was no basis for Judge Merritt's finding that "all" clients were offered secondary contingent fee financing "by" Century and that such contingent fee financing *followed* the "seed capital" financing -- such "arbitrary" conclusion erroneously *included* the "limited offering" funding into the second larger phase. JudgenMerritt's claim demonstrates a total lack of appreciation for the testimony and exhibits contained in the official trial record.

3. ***Judge Merritt claimed*** (Opinion, p. 5):

> "Freeman further misrepresented that Century would provide the sources of investors for his clients (TR at 123, 133, 162, 172)"

When in fact:

a. The testimony of four of the seven "alleged victims" served prior to the Business Divorce, ***Jenkins, Herbert, Clarks*** and ***Erbe*** is "completely" *silent* as to any representation to provide sources via the Appellant or any other defendant.

b. ***Morgan,*** like the four clients named above, also knew he would have to provide his own sources for the Phase I limited offering (TR 497-98). And as previously set forth, representations were made that Century would *look* for sources upon a contingency fee basis *after* he completed Phase I, but Morgan would not commit to any of the three offers of future service (i.e., Gov't Ex. G-3, 4, 5) and furthermore, Morgan admittedly never raised the Phase I funding

through his sources (TR 500).

c. ***Webster,*** like Morgan and the other four clients named above, also knew he would provide his own sources for his Phase I seed capital and limited offering according to his testimony (TR 753), the contract which he admitted was the basis of the bargain (TR 763-64), Wagner's testimony (TR 960) and Government admissions. And as previously set forth, representations of the future performance were that Century would *look* for sources upon a contingency fee basis *after* he completed Phase I, but Webster never completed Phase I through his own sources (TR 753) and furthermore, Webster embezzled Phase I funding from his shareholders, thus foreclosing any possibility for such future service under Phase II which he admitted was "later down the road" (TR 649).

d. ***Edleman,*** like Morgan, Webster and the other four clients named above, also knew he would provide his own sources for his Phase I seed capital and limited offering, for which all of the fees in question were tendered, according to his testimony (TR 143, i.e., Edleman to raise money in steps), the testimony of his attorney, Conrad (TR 176-77, i.e., Edleman, not Appellant, was a principal who was to raise limited offering), and Government admissions. And as previously set forth, representations of the future performance were made to Edleman regarding Century would *look* for sources upon a contingency fee basis *after* he completed Phase I and Judge Merritt's claim depicts four instances where the future performance was discussed (TR at 123, 133, 162, 172) in the testimony, all of which pertain only to Edleman and only to Edleman's Phase II financing. However, one cannot conclude that such representations are false merely because Century did not act because Edleman admittedly elected not to proceed with the whole deal which included Century's future performance to look for sources for his secondary financing, Phase II (TR 149-50).

Contrary testimony (i.e., all clients knew they had to raise their own limited offering funding); silence (i.e., 4 of 7 clients' testimony); and offers of a future performance (i.e., remaining 3 clients) subsequently rendered impossible by the client, do not support Judge Merritt's claim of Appellant's alleged misrepresentations to provide sources.

4. ***Judge Merritt claimed*** (opinion, p. 3):

> "Mr. Edleman realized after paying $5000 and receiving the comprehensive business plan that he would be raising money on his own, while paying a fee to Century (TR at 155)."

When in fact:

a. Edleman's testimony at TR 155 *does not* state a sudden revelation pertaining to first paying $5,000 and thereafter finding out he had to raise the money after receiving the comprehensive business plan. The full question (TR 154) and answer (TR 155) is as follows (TR 154-55):

> **Q.** I believe you testified on cross examination, Mr. Edleman, that you did not raise the $25,000 that Century or Mr. Freeman *told you* you had to raise, is that correct? (emphasis added)
>
> **A.** That's correct. I did not raise that.
>
> **Q.** You know why you didn't raise that?
>
> **A.** I felt that after I got the total comprehensive business package in the middle of June, late June, that I would just be continually doing most of the work myself, and paying them a fee. The fee was spelled out in that package, it was spelled out in the agreement that I signed.

Mr. Edleman's testimony at TR 154-55 confirms his recognition of the oral (i.e., Appellant told Edleman he had to raise the money) and written representations (X-296, para. 5) in the agreement he signed that Edleman would have to pay the $5,000 retainer plus the credit extended for completion of the comprehensive business plan from the first "seed capital" monies raised by him (Gov't Ex. I-11, X-296):

> "This means that we would be extending you credit for the work involved in *'Phase I'* in the amount of $6,500.00 to $8,000.00. We don't mind commencing this job on a retainer [$5,000] and extending this credit, however, when we have done enough work to provide you with the preliminary plan for the 'acquisition and capitalization' portion of the 'comprehensive business plan', and you have obtained at least $8,000.00 in seed capital, our estimated fees must be paid..." (emphasis added)

b. The agreement Edleman signed is dated April 18, 1975 (Government Exhibit I-11, X-293-98); Edleman had not paid the $5,000 retainer until May 8, 1975 (X-305). Moreover, Edleman testified that he, his attorney Conrad and Appellant met in "early April" (TR 122-23); Conrad testified that Edleman asked him to review the documents identified as Gov't. Ex. I-11 (the 4-18-75 agreement), Conrad did review this document and he did give Edleman an opinion on the document (TR 169-70); and all prior to taking the trip

to Morgantown, North Calorina on May 7, 1975. Conrad also testified (TR 169):

> "The legal documents pretty much, as far as form is concerned, conformed to the many conversations that we had had that morning with Mr. Freeman."

Edleman's testimony is consistent with *Government Exhibit I-11* (TR 155): "after I got the total comprehensive business package in the middle of June, late June, that I would just be continually doing most of the work myself, and paying them a fee...it was spelled out in the agreement I signed." And Conrad testified..."That was described as the hardest part that Mr. Edleman may encounter" (TR 172). It is inconceivable how a Federal judge could make such a blatantly false statement considering Edleman's contract, the dates on the contract and the check, Edleman's own testimony at TR 155 and 143, and Conrad's testimony. Edleman obviously knew prior to paying the $5,000 retainer what tasks lay ahead for him, however, neither Edleman no Appellant knew that Edleman would later "elect not to proceed with that deal".

5. ***Judge Merritt claimed,*** (Opinion, p. 3):

> "The initial interview consisted of a Century principal describing the many successful enterprises Century had financed."

When in fact:

a. ***Erbe*** testified as to discussions with Appellant; Erbe's testimony at "first glance" appeared to substantiate this "single allegation" (TR 96-97):

> **Q.** And what did they say with regard to this particular business? I'm sorry, what did Mr. Freeman say with regard to this particular --
>
> **A.** That *they* had raised funds and reorganized that, and it was doing very well. (emphasis added)

However, the Prosecutor then questioned further as to who "they" were, the person or organization that actually raised the funds (TR 97):

> **Q.** Forgive me, Mr. Erbe, is it your testimony that Mr. Freeman said they had raised funding for the raising of the house project?
>
> **A.** No. The company that was doing it. The company that was raising these houses, the construction company or whatever it was.

Erbe's testimony clearly contradicts Judge Merritt's statement.

b. ***Jenkins,*** the "alleged victim" who couldn't remember anything *any* defendant even said to him, *Supra;* but Jenkins remembered the *house raising construction* company (TR 472):

> **Q.** Do you remember the subject of your conversations?
>
> **A.** I can't remember that, other than they showed me brochures of businesses that had been helped by them.

Jenkins recalled a brochure being *shown* to him (i.e., Brown's house raising construction company) wherein the company would raise a one-story house by jacks and build underneath it; he recalled *no* conversation "other than just explaining this particular business" (TR 474).

c. ***Webster*** alluded to Brown's *construction company,* an Illinois firm and other companies as well (TR 648):

> **Q.** What did Mr. Freeman say to you?
>
> **A.** This is what I was going to say. Mr. Freeman said that they would have to submit this to their New Client Committee, and -- but, from what they read and checked and talked to other people so far, that they *feel* that they have somebody that would *possibly* be interested in financing this. They have financed things of similar or like things before.
>
> I know he had mentioned one time there was a *construction firm,* I can't remember the name, but he didn't read off the name, in Illinois, I think it was, that *they had helped and financed,* and there was also a -- oh, amusement park thing like Cedar Point, it was American, or Americana, or something like that, and also a -- oh, right here in Grand Rapids, there was a hotel or something *they* were financing, some type of complex *they* were *putting up* and he mentioned that they had quite a few insurance companies and doctors and people of this type. He did mention he knew some pilots personally that like to finance this type of thing, because they had a lot of extra income that they needed financing, tax shelters and such." (emphasis added)

Webster was referring to discussions relative to his Phase II financing (second agreement (X-227-28)..."which was later down the road" (also at TR 649).

The Government never tried to clear the air as to "who" actually had to obtain the funds for the businesses Century had *helped*--the Government knew that Century's *help* amounted to the "business

plan". The Government also knew who had actullay obtained the funds for the *construction* company the business plan was prepared for as the Prosecutor so determined when Erbe had previously testified as to who *they* were, *Supra.* The Government knew Century wasn't *putting up* hotels and therefore Century wasn't the *they* Webster was referring to. The Court's Opinion p. 3 states:

> "Freeman misrepresented to various clients that Century had successfully funded other businesses (see, e.g., TR 648 Webster testimony that Freeman represented that Century hadhelped finance Americana Amusement Park when, in fact, Americana's promoter was one of Century's dissatisfied clients who testified against Freeman at trial.)"

However, no one from Americana Amusement Park ever testified at trial, moreover Webster's testimony..."I *think* it was, that they had *helped* and financed [speaking of the construction company],...*and there was also a -- oh, amusement park thing like Cedar Point, it was American, or Americana, or something like that*" is not a representation as to whether Century had *helped* or *financed* much less a misrepresentation that..."Century had successfully funded other businesses."

d. ***Herbert*** and his partner ***Howard's*** testimony is *silent* as to any discussion of *any* help or funding of other clients of Century, as was Morgan and Edleman's testimony.

e. As to the ***Clarks*** who were only "introduced" to Appellant: Henry Clarks' testimony was also silent as to any discussions of any help or funding by Century; Frank Clark merely testified (TR 411):

> **Q.** And you were telling us the general nature of Mr. Humphrey's remarks?
>
> **A.** He was explaining the -- what Century Consultants did, and by way of showing -- explaining this, he was showing us a couple of examples of other businesses that they had *helped*, and the results of those helped, that they were successful operations now, and it was the completion of that..."

It is unrebutted that Brown, owner of the house raising construction company, who also needed a plan for reorganization, raised "more capital" than his "limited offering" business plan called for (TR 1547-48) via Century's help, but Brown and his principals actually did the fund raising.

It's unrebutted that many clients had been *helped* by Century and at least eleven such clients had fully succeeded in obtaining their

own limited offering funding: Haas, who testified at trial (TR 1104-09); Witmer, who testified at trial (TR 1084-89); Brown (TR 1547-1551); Fouts (TR 595-96); Coville Engineering (TR 1656); and others (TR 1546-47). Even the Government admitted "that there were 11 companies that were successful in every instance" (TR 1787).

As can be seen by the testimony or silence of all seven "alleged victims" served prior to the Business Divorce, the initial interview did *not* consist of a discussion of many successful enterprises Century had financed as Judge Merritt had claimed above.

6. ***Judge Merritt claimed*** (opinion, p. 4-5) that:

> "Not only did the advertisement *solicit* seekers of venture capital, but the government witnesses testified that such was their purpose in *hiring* Century Consultants and that that purpose was emphatically set forth during initial consultations."

When in fact:

a. The *Wall Street Journal* ad solicited NO ONE; all 7 clients were referrals from Angel Wilson (TR 102; 117; 298; 366; 470; 494; and 645). Only Morgan testified as to seeing the ad,..."coincidentally at that time I was introduced to Century Consultants by Angel Wilson...however..."that's really all there was to that" (TR 494).

b. The ad (X-328):

> "Need Venture Capital? Marketing Assistance? Business Guidance? Century Consultants (312) 298-7044"

is not misleading as Judge Merritt implied:

(1) "Venture capital" does not mean just funding by another; the term encompasses many methods of raising money, including, but not limited to "limited offering" funding by principals (clients).

(2) Century also directly sought sources of venture capital for clients needing "institutional" sources of financing from institutions or institutional investors; Coville Engineering project was one such client in need of such type of venture capital (X-*352*-400) which Appellant successfully located such a source, and it should be noted that such client according to the Government (2nd Reply Brief, dated October 14, 1981, p. 27): "Coville project failed for reasons not attributable to financing." *Id.*

c. The "alleged victims" did *not* testify that they *hired* Century Consultants to actually "seek" venture capital as Judge Merritt said they did:

(1) ***Edleman,*** on direct examination, testified as to why he

came to Century Consultants (TR 117):

Q. When you went to Century Consultants, Mr. Edleman, what did you go for?

A. To get a comprehensive business plan to obtain financing.

Additionally, Edleman testified he "went to Century to figure out a way to do a business purpose" (i.e., start a new company) and that he "went to Century Consultants *to get advice* as to how to do that" business purpose (TR 140 and 141) (emphasis added).

(2) ***Erbe*** testified as to discussions with Appellant concerning his first free exploratory meeting with Appellant (TR 90):

..."What we needed, our plans for *reorganization* or what we would do if we could recapitalize" (emphasis added)

And Century's offer of service did in fact conform with Erbe's reason for coming to Century and Erbe understood why he tendered such fees (TR 102):

"THE WITNESS: We paid them $5,000 as a -- I don't want to say retainer. It was a partial payment, supposedly to put -- to *reorganize* our company to make a prospectus; to induce investors to invest money in it." (emphasis added)

The contract with Erbe (X-289-92) spelled out what type of a *reorganization* plan Century would develop, if the specified fees were tendered and how Erbe could recapitalize (X-291):

"This capitalization plan would be designed so that a *limited offering* could be made by *you* and/or your officers and directors." (emphasis added)

(3) ***Morgan,*** according to his own statement recorded in the Confidential Information Booklet (provided at the first free exploratory meeting) to wit he filled out, states (X-263):

"Our most pressing current objective is to create the financial vehicle to bring this project into being."

Century Consultants in the August 19, 1974 contract, (Def Ex D-G-2) set forth such a financial plan to be created so that the "financial vehicle" Morgan wanted could be provided.

Morgan's testimony reflects such a contractual understanding (TR 496):

Q. Now were there any fees discussed?

A. There was an initial fee. In fact, yes, there were. In other words, *the whole process was laid out.* The number 14 to

$16,000 was indicated as being a fee to get through this --in other words *to do this consulting work,* and they wanted $5,000 up front (emphasis added).

Morgan testified that he knew he had to raise the capital himself and such was made clear to him before he parted with any money, *Supra.* Such testimony directly contradicts Judge Merritt.

(4) ***Clark*** according to his own statement recorded in the Confidential Information Booklet (provided at the first free exploratory meeting) to wit he filled out, states (TR 459-60):

"The business is too young to have developed any grand plans for capitalization before now, except for our individual contribution to the business. Century Consultants is analyzing our business and advising us on future capitalization."

Thereafter, Century advised the Clarks in writing that their "limited offering" was to be funded "by" the Clarks (X-113, para. 7).

(5) ***Webster*** testified as to why he hired Century (TR 793):

"...because of their expertise in business consulting and marketing and finance..."

Webster also testified (TR 765):

"...I was a person going to them to be *hiring them as my consultant,* and they were telling what *I needed to do* to get funding. (emphasis added)

Webster admitted the April 22, 1975 offer of services (the contract in evidence, F-36, X-230-234) resulted from his first meeting with Century and was in fact the services promised to be performed for "the fees paid" (TR 763-64):

Q. Now Mr. Webster, the exhibit that I have handed you [F-36] dated April 22, 1975, is th' exhibit that you drew out of your first conferences with Century Consultants, and was a basis upon which you employed them to be your consultants, is that not correct?

A. Yes.

F-36 (X-230-34) covers the contract to produce a "seed capital" and "limited offering" business plan in exchange for $11,000 ($3,500 retainer and subsequent payment of $7,500, the fees in question).

Webster's testimony directly contradicts Judge Merritt's statement as to why Webster hired Century.

(6) ***Jenkins*** testified that he knew he had to raise his own

capital because he was "told" he had to raise it (TR 485-86). Obviously Jenkins did not hire Century Consultants to obtain his funding as Judge Merritt said he did.

(7) *Herbert* testified he hired Century and paid the $5,000 retainer after he had read this contract language:

> "This capitalization plan would be designed so that a limited offering could be made by you and/or your officers and directors" (TR 323-24).

Herbert's partner, Howard, also directly contradicted Judge Merritt's statement wherein he testified (TR 343-44): "We talked about...how we should go about getting the money." (Herbert, Haney and Howard being "we")

The testimony of the alleged victims demonstrates that they hired Century based upon the written contracts which all stated (e.g., X-297):

> "Upon receipt of the aforementioned retainer of ($5,000.00), we will commence the aforementioned work."

Its no wonder the Government admitted (2nd Reply Brief, dated Oct. 14, 1981, p. 23):

> "Appellant did provide his victims with a plan pursuant to his contract with them."

Judge Merritt's claim is contrary to the testimony and exhibits, adduced at trial to wit even the Government found inescapable to acknowledge upon appellate review.

And finally, Judge Merritt's reiteration of the same theory, below, in retrospect, has the lower court even appearing further removed from the actual evidence:

> "Viewed as a whole, *the evidence is sufficient* for the jury to conclude that Century Consultants' clients, based on advertisements in the *Wall Street Journal*, approached that organization for the sole purpose of finding a source of venture capital . . ." (Unpublished Opinion, p. 5) (emphasis added)

The court took an irrelevant ad which solicited no one and manufactured an *imaginary basis* upon which the alleged victims hired Century Consultants. This court's conduct is appalling and is in fact a serious violation of the public's trust in a judicial system which is sworn to uphold the constitutional rights of an accused.

7. Judge Merritt claimed:

"Further, although the written memorandum and comprehen-

sive business plans are written in suitably ambiguous language, those documents read in light of oral misrepresentations made to the clients reinforced their belief that Century would provide at least the bulk of the sources of investment." (Unpublished Opinion p. 5)

When in fact:

a. Written memorandums were complete understood by the clients and their testimony contradicts any notion of ambiguous language, *supra;*

b. The comprehensive business plans likewise were anything but ambiguous according to the only testimony received on such issue, Mr. Abel, an expert witness, testified:

Q. Do the plans themselves do what they set out to do?

A. They--in each case there's a charge set forth, and the sections of the report are responsive to the charge. They do the things they say they're going to do. (TR 1069)

c. The lower court like the government spoke of alleged oral misrepresentations however they failed to produce any proof by use of the official trial record.

d. It is totally uncharacteristic of a U.S. Court of Appeals to include in their proof of a sufficiency case any matter which was stricken from the record due to an objection being sustained by the trial judge. However, the above statement with regard to the written memorandum and comprehensive business plans reinforcing a client's belief of Century funding their business was objected to an sustained at TR 162.

8. ***Judge Merritt claimed*** (Opinion, p.2):

"If the client retained Century and sent $5,000, the consultants would then prepare a "Confidential Business Report". This report repeated much of the information regarding background, history and details of the proposal, as originally presented to the consultants by the client."

When in fact of the seven alleged victims served prior to the Business Divorce only "two" of such clients "Confidential Business Reports" (prepared by Century) and "information" reports (prepared by the client) are in ***evidence,*** Herbert and Webster:

a. Herbert's 12 page information report (X-13-25) tells any person who can read the Envlish language that it contains nothing except the prior history of the existing store operations and a

resume of Howard and personal financial statements of Herbert, Howard and Haney. This 12 page information report prepared "by the client" is *totally void* of the "details of the proposal" which Judge Merritt falsely states that it contains. Century's Confidential Report (X-26-101) contains 85 pages, only 4 of such pages are, for "disclosure" purpose devoted to "background history" condensed from Herbert's 12 pages; the remainder is Century's work product containing the "details of the proposal" *developed* "by" Century -- not Herbert. Herbert himself provided testimony concerning the "Confidential Business Report" prepared by Century (TR 330 and TR 331):

Q. But it had a detailed study of how you might try to make a real success out of your business? At least good safe ideas on how to do it?

A. Yes.

Q. Now sir, did Century also propose some marketing plans, and then some plans as to how you would set up capital accounts of your company, and how you would be able to offer the public a type of security, or offer not to the public, but to those limited persons you would offer it to, a security package that might be of interest?

A. Yes.

b. Webster submitted an "information report" (X-235-39) to Century -- Webster's "personal" background and history of his personally owned hardware store -- Webster's information report does not contain "one" word about the "details of the proposal" for Webster's Shopping Center that Judge Merritt claimed. The "details of the proposal" were *developed* by Century; they were not just "repeated" from Webster's report [see Webster's 79 page Confidential Business Report (X-136-215)].

Appellant knows not what could compel a Federal judge to invent evidence which cannot be supported by the official trial record and which is in fact contradicted by such record.

9. *Judge Merrit claimed* (Opinion, p 3)

"From April, 1975, through September, 1976, Webster continued paying Century consulting fees totaling some $27,000. (TR at 729; Exhibits App. at 122-45.) Webster never received any funds through Century."

When in fact:

a. Webster testified that the last time he ever saw Appellant was in June, 1975 (TR 667). Webster also testified that he paid

Century total fees amounting to around $27,000 (TR 729). Such total fees included "wire transfers" (Counts 5 and 6) that occurred after the Business Divorce which Counts the trial jury saw fit to acquit Appellant. Also included in the $27,000 was *$11,000* which Webster paid for the seed capital and limited offering business plan dated July 31, 1975 (X-136-215) produced pursuant to Webster's *first* contract (X-230-34) ($3,500 retainer and the $7,500 paid May 29, 1975, the fees in question). Webster's testimony makes it clear the other fees were paid *later* (TR 770); also see Note 2, page 11

The contract (X-230-34), testimony of Webster, Webster's attorney Monte Story (TR 1060), and Government Witness Wagner make it very clear that $11,000 tendered by Webster was for a seed capital and limited offering business plan that was to be funded "by" Webster and therefore "no" funding by Century was due Webster as Judge Merritt so inferred.

Judge Merritt simply had no appreciation for the *actual* evidence.

10. ***Judge Merritt claimed*** (Opinion, p. 3-4):

> "Defendant argues that the written memorandum explained, before the client parted with any money, that the client would be responsible for raising the seed capital. Second, the memorandum and comprehensive plan stated that subsequent phases of raising capital would not begin until after the client had succeeded in obtaining the seed capital. Third, a separate agreement was signed on a contingent fee basis for Century to act as a finder for the bulk of the desired capital."

When in fact:

a. The Appellant's briefs, the clients' testimony and their contracts demonstrate the inaccuracy of the court's misrepresentation that such was Appellant's arguments.

b. The above-mentioned quote demonstrates the court's total lack of integrity by attempting to show their argument was Appellant's prior arguments in briefs submitted to that court and that same concurred with their manipulation of the evidence (Court's opinion, top p. 3):

> "Should the client manage to raise the required seed capital, Century would then offer further services for obtaining the second, larger phase of capital on a contingent fee basis. *Id.*

As Appellant has already demonstrated, the court's inter-

pretation of the services to be performed as per the testimony and contracts of the alleged victim witnesses simply does not exist. The court's attempt to boot strap their argument as if it were Appellant's argument was a cheap trick unbecoming of a Federal Judge.

11. ***Judge Merritt claimed*** (Opinion, p. 3):

> "Mr. Philip Morse refused to pay any more than the initial $5,000 retainer because of nebulous answers to his repeated queries as to the exact financial sources Century would tap to obtain the needed capital for the second and third phases of his project. (TR at 509)."

When in fact:

a. Philip Morse did not provide that testimony -- he was the Prosecutor;

b. Morgan's business plan for Phase I had been completed and reviewed with Leigh Johnson on November 12, 1974 (X-287). Leigh Johnson's three letters *Supra* explain exactly how Century was willing to pursue Morgan's Phase II and Phase III work (i.e., after Morgan raised Phase I-$200,000) and they were written on 12-5-74; 12-9-74 and 12-27-74, and sometime thereafter, Morgan made the statement (TR 509):

> "I was not satisfied with where the bulk of the $20,000,000 was going to come from. I had no idea specifically, and I asked *Leigh Johnson* over and over, "Now I want to know *exactly the sources* of these funds before I give you another penny. And, *in my opinion,* I felt that the answer to my question, even in writing, [Leigh Johnson's 3 December letters] was too nebulous for me to assume any longer that that money was forthcoming. In other words, I had no idea where it was going to come from, or just how they would do it." (emphasis added)

Morgan's testimony is nothing more than a feeble excuse for not paying Century the $11,494.99 he owed Century for the *only* work he ever contracted with Century to perform. His excuse comes *after* he received the work and failed to raise the $200,000 which he admitted, "had we gotten (through Phase I), "Phase II and III was Century's job. And Morgan thought he was capable of raising the $200,000 (TR 498):

> "I feel that I am a good enough salesman that I could get through that phase without too much trouble."

The above-mentioned quotation from the Unpublished Opinion

further demonstrates the court's inability to appreciate *who* testified and what such testimony demonstrates.

12. ***Judge Merritt claimed*** (Opinion, p. 6):

> "Whatever hopes Freeman might have had that the 'Limited Offering' presented by his clients might help them raise money, he could not have an honest belief that such would raise upwards of $20 million."

When in fact:

a. Appellant never expressed any belief that anyone could ever raise $20,000,000 via a "limited offering."

b. No "alleged victim had a plan for a limited offering that exceeded $250,000 as can be seen by "all" contracts and testimony.

c. The trial record has ample amount of evidence as to Appellant's honest belief that clients could succeed through "limited offering" funding (also see, Gov't admission TR 1787; 11 prior successes) and many of the "alleged victims" were confident in their abilities up to the point of actual performance (i.e., Webster's confidence, TR 959-60)--then it became Appellant's fault they didn't succeed.

13. ***Judge Merritt claimed*** (Opinion, p. 5):

> "None of Century's clients who testified ever had their project presented to Mr. Oberman, and Mr. Oberman testified that Freeman never presented a project to him as a possible investment after the project fell through."

When in fact:

a. Appellant was *not* to present any of the seven "alleged victims" seed capital or limited offerings to Oberman[2] or any other source; these clients served prior to the Business Divorce paid fees for nothing but seed capital or limited offering plans which they "knew" they had to fund themselves, *Supra,* just as the contracts so advised and just as the Government so admitted, *Supra.*

b. Had Appellant presented any of the clients' limited offering projects to Mr. Oberman, Appellant's source witness, such ac-

---

2. Oberman was a source Appellant had secured to obtain a $1,500,000 commitment for a pre-indictment period client, Coville Engineering (TR 1209-25) that had successfully concluded their limited offering (TR 1656).

tion would have violated securites regulation as Appellant was not a principal of the client's company, and would have been soliciting an unregistered security as its exemption status would have been violated by such solicitation. Appellant advised in every contract, e.g., Edleman X-295:

> "your attorney will explain to you exactly how to protect your right to use the private or limited offering exemptions." *Id.*

c. Freeman never presented a project to Oberman for possible investment because neither Edleman nor Webster completed Phase I funding--unlike the Coville Engineering project which was presented to Oberman, after it had successfully concluded its Phase I-"limited offering."

There simply is "no" basis for Judge Merritt's belief that Century should have presented alleged victims seed capital or limited offering financing plans to any source -- such belief as stated by Judge Merritt is contrary to "all" evidence.

14. ***Judge Merritt claimed*** (Opinion, p. 4):

> "Whether or not the comprehensive business plans had some value as a basic outline for business reorganization and marketing, they did nothing to further the clients primary goal; to have Century Consultants find investors for their project."

When in fact:

a. The case before Judge Merritt involved people entering into contracts by exchanging promises of performance to wit each party has, at least, in the past 200 plus years, been able to rely upon that writing as manifesting the true intentions of the parties (particularly when such contracts were not disputed by any alleged victim) and such contracts were the basis of alleged victim's employing Century as per their own testimony, *Supra.*

b. The contracts, the testimony of the alleged victims, and the Government admitted that Appellant performed pursuant to the contracts which called for Century to produce a limited offering type business plan wherein such capitalization plan was specifically *designed* to be capitalized by the client and/or his officers and directors. The clients, the government and expert witness Able agree the business plans were *only* to be used by the client and *not* Century (TR 1072).

Judge Merritt's alleged "clients' primary goal" is again nothing more than another attempt by the court to *invent* evidence

notwithstanding an overwhelming abundance of evidence to the contrary. Had the clients contracted for or Appellant represented that such primary goal would be met by Century for the fees tendered, this case would not have proceeded to this point.

SUMMARY

Appellant was entitled to a sufficiency of the evidence ruling based upon the *actual* evidence contained in the official trial record. The reviewing panel responded by *falsely* stating the existence of testimony which cannot be found in the official trial record. Appellant has demonstrated by example after example that such lower court's comprehension of the actual testimony and exhibits was incredible.

Appellant has not sought this writ of habeas corpus upon a few isolated examples of the court's misapprehension of minor facts (i.e., Philip Morse, the prosecutor, didn't testify at TR 509, it was Mr. Morgan). The lower court's concept of Appellant's alleged misrepresentations being verified by testimony from four persons who never testified, from three persons who never knew of him, from one person who could not remember any discussion with Appellant, and the like--can only be likened to the justice one finds in communist countries.

Appellant has demonstrated that neither he nor anyone else misrepresented what services would be provided for the fees tendered. No client testified he was solicited by an advertisement, all were referrals. No client testified he hired Century to fund their business. No client testified Century had successfully funded previous clients' businesses. All clients who knew of Appellant testified there was a written contract specifying Century was retained to produce a business plan designed to be capitalized by the client via a seed capital plan and/or a limited offering prospectus prepared by an attorney utilizing such business plan. Both the clients and the Government admitted Appellant provided business plans pursuant to their contracts.

The lower court held Appellant responsible for not providing limited offering funding under the business plans for which all fees were tendered nothwithstanding all the evidence to the contrary. The court also held Appellant responsible for not providing secondary funding (Phase II). However, only three clients ever had discussions calling for secondary funding by Century. And such secondary funding, according to their testimony, was supposed to follow their limited offering capitalization. But Morgan never completed his

capitalization and never even contracted for such future performance. Webster contracted for such future performance but prior to completing his capitalization, he embezzled shareholders' money. Edleman also contracted for such future performance, but "elected not to proceed" even prior to attempting his limited offering capitalization. Not one of the three clients claimed Century represented secondary funding efforts prior to completion of their limited offering capitalization. Only the lower court's non-evidentiary finding holds Appellant responsible for all fund raising beyond the seed capital.

It is clear from the Government's briefs and the Unpublished Opinion that instead of taking the "evidence in a light most favorable to the government" [Unpublished Opinion, App. A, (1a)], the lower court merely applied unsubstantiated government argument "in a light most favorable to the government" in order to justify its findings of sufficient "evidence" from which the jury could have allegedly found Appellant guilty beyond a reasonable doubt. However, considering the jury never had knowledge of such non-existent "evidence" because such alleged facts are not contained in the official trial record, the question of sufficiency of the evidence remains unanswered.

The Unpublished Opinion appears tidy and complete on its face, however, it should not be said that such review, substituting government argument for *actual* evidence, satisfied the constitutional mandate which guarantees the right to a full, fair review of the *actual evidence,* the right to a fair trial based upon the fruits of confronting the accusers with regard to the charges of illegal conduct set forth in each count of the Indictment, and the right to an independent and unbiased court of review. Count 1 essentially claimed Jenkins was defrauded by Appellant misrepresenting many things, however, Jenkins could not remember any representations made by Appellant or any other person. Count 2 claimed Herbert was defrauded by Appellant misrepresenting many things, however, Herbert and his partner, Howard, contradicted such alleged representations. Counts 3 and 4 claimed the Clarks were defrauded by Appellant's misrepresentations, but the Clarks were only introduced to Appellant. Counts 5 and 6--Appellant acquitted. Count 7 claimed Webster was defrauded ($7,500) by Appellant misrepresentations but Webster admittedly received the specific performance promised for such $7,500 and himself foreclosed the future performance via embezzlement, no misrepresentation of service to be rendered was demonstrated. Count 8 alleged conspiracy to take money via misrepresentations but no misrepresentations were shown and one cannot conspire to perform

consulting services per acknowledged written contracts to wit performance was admittedly rendered for the fees tendered. One cannot excuse or overlook the negligence expressed in the Unpublished Opinion. To cover up injustice when directly confronted with shortcomings of such constitutional magnitude is a perilous course for a judicial system to take in a political system which encourages free speech and a strong independent mass media.

This Writ of Habeas Corpus is warranted in the above-entitled case because this is not an ordinary "sufficiency of the evidence" case. This Court should exercise its supervisory power for the reason Justice Frankfurter stated in *McNabb v. United States,* 318 U.S. 332 (1943):

> "Judicial supervision of the adminstration of criminal justice in the federal courts implies the duty of establishing and *maintaining civilized standards of procedure and evidence.* Such standards are not satisfied merely by observance of those minimal historic safeguards for securing *trial by reason* which are summarized as 'due process of law' and below which we reach is really *trial by force.*" (emphasis added)

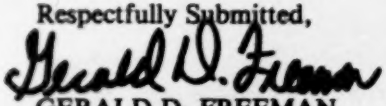
When due process of the law can be circumvented by a reviewing panel falsifying testimony, an accused constitutional right to confront and cross-examine his accusers has most certainly been lost and what we have reached is indeed *trial by force.*

Petitioner respectfully believes that such Writ of Habeas Corpus is warranted in a sufficiency of the evidence case wherein the lower court so totally misconstrues the evidence that justice and petitioner's constitutional rights cannot be said to be satisfied.

CONCLUSION

We respectfully pray such Writ of Habeas Corpus issue for the purpose of directing the Sixth Circuit Court of Appeals to reverse and remand this case upon a finding of Judgment of Acquittal (N.O.V) as to all Counts.

Respectfully Submitted,



GERALD D. FREEMAN
Attorney for Petitioner
4755 N. Washtenaw
Chicago, Illinois 60625

APPENDIX A

UNPUBLISHED OPINION

No. 80-1624

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

GURN H. FREEMAN,
Defendant-Appellant.

ON APPEAL From The United States District Court for the Western District of Michigan.

Decided and Filed October 1, 1982.

Before: LIVELY, KEITH and MERRITT, Circuit Judges.

MERRITT, Circuit Judge. We affirm Gurn Freeman's conviction of six counts of mail fraud, transportation of a check "knowing the same to have been taken by fraud," and conspiracy to commit mail and wire fraud in violation of 18 U.S.C. §§ 1341, 2314. He was sentenced to five years imprisonment followed by five years of probation and fined $11,000. Most of the issues presented on appeal were considered by District Judge Miles in his opinion denying a motion for a new trial.

Mr. Freeman forcefully and effectively argued his own appeal. The main issue on appeal is whether the prosecution presented sufficient evidence of a scheme to defraud to constitute a violation of 18 U.S.C. § 1341, viewing, as we must, the evidence " 'in the light most favorable to the government.' " *United States* v. *Stull*, 521 F.2d 687, 689 (6th Cir. 1975), *cert. denied*, 423 U.S. 1059 (1976). Fourteen "victim" witnesses in need of "venture capital" testified about Freeman's alleged "scheme to defraud" them of money through false representa-

tions that Century Consultants could provide them with needed capital for expanding or recapitalizing their present business or starting new enterprises. Century Consultants placed an advertisement in *the Wall Street Journal* which offered: "Need Venture Capital? Marketing Assistance? Business Guidance? Century Consultants [phone number]." Each of Century's clients stated their needs for capital from the beginning. The initial interview consisted of a Century principal describing the many successful enterprises Century had financed, and the interviewee atempting to "sell" his project to the firm. The prospective client left with an elaborate application requesting extensive information on his financial status, the history of the company or business to be capitalized, the projected plan, and personal history. After the form was returned, Century would then submit the project to its "New Client Committee," which was invariably enthusiastic about the profit potential and investment feasibility of the planned project and accepted the new client.

Century mailed an acceptance to the new client, accompanied by a memorandum which set forth a rough plan for recapitalization by incorporation, limited partnership, joint venture, or similar device, and divided investment potential into at least two phases. The potential client was always told that he must first present a stronger position to investors by obtaining an initial capitalization through "A Limited Offering" which Century Consultants, if retained, would help the client prepare. The retainer for such work was $5,000, out of which would come the $50 per hour consulting fee, and the total fee was estimated to range from $7,500 to $16,000. *See, e.g.*, Exhibits App. at 5-8, 105-09, 111-14, 230-34, 293-98.

If the client retained Century and sent $5,000, the consultants would then prepare a "Confidential Business Report." This report repeated much of the information regarding background, history and details of the proposal, as originally presented to the consultants by the client. This report would

suggest a limited offering to raise the initial or "seed capital." Should the client manage to raise the required seed capital, Century would then offer further services for obtaining the second, larger phase of capital on a contingent fee basis. Consulting fees continued, however, at $50 per hour plus all expenses for travel and accommodations, and the fees were paid from the seed capital raised by the client.

Clients became disenchanted with Century at various stages of the scheme. Mr. Edleman realized after paying $5,000 and receiving the comprehensive business plan that he would be raising money on his own, while paying a fee to Century. (Tr. at 155.) Mr. Phillip Morse refused to pay any more than the initial $5,000 retainer because of "nebulous" answers to his repeated queries as to the exact financial sources Century would tap to obtain the needed capital for the second and third phases of his project. (Tr. at 509.) Gordon Webster was the most tenacious of the clients who testified. He raised his own "seed capital" of $25,000 even before Century completed the comprehensive business plan. From April, 1975, through September, 1976, Webster continued paying Century consulting fees totaling some $27,000. (Tr. at 729; Exhibits App. at 122-45.) Webster never received any funds through Century.

Essentially, defendant argues that the above scheme involved no more than a client receiving:

> . . . exactly what Century contracted to give him. The real question is whether or not a person who delivers what he promises, in language at least plain enough for most people to understand, can be guilty of fraud because of a failure to deliver what the customer desired and believed (in some instances) would be forthcoming.

Appellant's Brief at 13. Defendant argues that the written memorandum explained, before the client parted with any money, that the client would be responsible for raising the seed capital. Second, the memorandum and the comprehen-

sive plan stated that subsequent phases of raising capital would not begin until after the client had succeeded in obtaining the seed capital. Third, a separate agreement was signed on a *contingent* fee basis for Century to act as a finder for the bulk of the desired capital. And fourth, the client was always encouraged to employ a lawyer and an accountant to participate in the proceedings. Finally, defendant offered the testimony of an expert witness that the comprehensive business plan had "some value." (Tr. at 1069.)

Even assuming the five factors noted above to be true, there is sufficient evidence in the record of a scheme to defraud. In order to be prosecuted under the mail fraud statute, the defendant must commit an actual fraud; that is, he must have a specific intent to deceive or defraud. *Epstein* v. *United States,* 174 F.2d 754 (6th Cir. 1949). The scheme must include representations made by the defendant which are known to be false, and one or more persons must be defrauded. *United States* v. *Rabinowitz,* 327 F.2d 62 (6th Cir. 1964). Proving intent through misrepresentations does not require a showing that Freeman never entertained any hope that his clients' ventures would be successful. Rather, the jury may find that Freeman had "no basis in fact for believing that the business to be operated . . . would be profitable, and that appellants' expressed opinion to that effect was therefore not actually entertained or at least not honestly entertained." *Irwin* v. *United States,* 338 F.2d 770, 774 (9th Cir. 1964), *cert. denied,* 381 U.S. 911 (1965). Nor is proof that a defendant intended or desired to complete a project for his investors an excuse for knowing misrepresentations. *United States* v. *Habel,* 613 F.2d 1321, 1325 (5th Cir.), *cert. denied, Carcaise* v. *United States,* 447 U.S. 925 (1980).

Whether or not the comprehensive business plans had some value as a basic outline for business reorganization and marketing, they did nothing to further the clients' primary goal: to have Century Consultants find investors for their projects. Not only did the advertisement solicit seekers of venture

capital, but the government witnesses testified that such was their purpose in hiring Century Consultants, and that that purpose was emphatically set forth during initial consultations. Further, although the written memorandum and comprehensive business plan are written in suitably ambiguous language, those documents read in light of oral misrepresentations made to the clients reinforced their belief that Century would provide at least the bulk of the sources of investment. Freeman misrepresented to various clients that Century had successfully funded other businesses. (*See, e.g.*, Tr. at 648, Webster testimony that Freeman represented that Century had helped finance Americana Amusement Park when, in fact, Americana's promoter was one of Century's dissatisfied clients who testified against Freeman at trial.) Freeman further misrepresented that Century would provide the sources of investors for his clients. (Tr. at 123, 133, 162, 172.) Freeman offered the testimony of a single "source," to rebut the charge that he had no such sources. Ike Oberman, a certified accountant, testified that he became interested in a project for which Mr. Freeman had asked him to prepare a financial projection. (Tr. at 1211.) Taking the initiative, Oberman suggested that he might be interested in becoming a principal for the project and could ask other sources to invest as well. (Tr. at 1212 *et seq.*) Although Freeman agreed and a good deal of potential capital was raised, that particular project never progressed past the planning stage. None of Century's clients who testified ever had their project presented to Mr. Oberman, and Mr. Oberman testified that Freeman never presented a project to him as a possible investment after the project fell through.

Viewed as a whole, the evidence is sufficient for the jury to conclude that Century Consultants' clients, based on advertisements in the *Wall Street Journal*, approached that organization for the sole purpose of finding a source of venture capital; that Freeman intentionally misrepresented to them that Century had procured investors for several projects and,

should they be accepted as clients, could tap extensive sources for financing; that the clients never received any funding from Century; and that Freeman could not have believed, or honestly believed, that he would procure such sources of capital.

These misrepresentations distinguish this case from *United States* v. *Rabinowitz*, 327 F.2d 62 (6th Cir. 1964), cited by the appellant as requiring reversal of his conviction. In *Rabinowitz*, this Court analyzed the permissible bounds of sales talk in overturning a mail fraud conviction. Customers in that case never paid any money until they had been shown the object of their purchase, a knitting machine, and had a lesson on how to use it. The machine "was not a flimsy fake. It was excellently designed and well built." *Id.* at 80. Only 14 of 689 purchasers testified for the government that they could not make the garments fast enough to make the payments on the machine, while "a number" testified that they had indeed been able to make enough garments to make the payments easily. Thus this Court concluded:

> There was sales talk, yes — there were exaggerations. But they were made to people who had seen the machines and could presumably know ther own capabilities. That both salesmen and purchasers were mistaken as to this does not spell out an intent to deceive.

Id. at 81. In the case before us, in contrast, clients were never given an opportunity to examine potential financial sources because there were none. Whatever hopes Freeman might have had that the "Limited Offering" presented by his clients might help them raise money, he could not have an honest belief that such would raise upwards of $20 million. In sum, Freeman's sales talk exaggerated and puffed up an underlying illusion, not a well built machine available for a customer's inspection.

The recent case of *United States* v. *Shelton*, 669 F.2d 446 (7th Cir.), *cert. denied*, *Bledsoe* v. *United States*, 102 S.Ct.

1989 (1982), is similar on the facts to the case before us. In what was described by the Court as "a bucolic variant of a 'Ponzi scheme,'" the defendants in *Shelton* sought investors for a farmers' cooperative which would establish facilities for the buying and selling of farm products and equipment. The defendants, though very successful at raising funds, paid themselves so much in management and "consulting fees" that the cooperative's proposed facilities "remained an improbable, if not impossible, dream." *Id.* at 450. The Court concluded that there was sufficient evidence for the jury to infer that the defendants defrauded investors with the farmers cooperative concept, which provided "the potential for lucrative personal returns through the . . . consulting agreement" and that the defendants had made "various misrepresentations about the success of [a prior] operation." *Id.* at 453. The case before us also involves an unsound concept for raising large sums of capital which offers lucrative personal gain for the defendants through consulting fees and includes misrepresentations about the success of prior financing projects.

Even if a scheme to defraud is proven, Freeman contends, Count One of the conviction must be vacated because the government failed to prove that the letter involved was mailed to witness Jenkins rather than hand delivered. Title 18 U.S.C. § 1341 is violated when the perpetrator of a fraudulent scheme "places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service . . . or knowingly causes to be delivered by mail. . ." any such matter. As has been stated by both this Court and the Supreme Court, " 'Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'caused' the mails to be used.' " *United States* v. *Talbott*, 590 F.2d 192, 195 (6th Cir. 1978), *quoting Pereira* v. *United States*, 347 U.S. 1, 8-9 (1954). Further, " '[t]hat the confirmation letters and mailed check could have been hand-delivered

or delivered otherwise than through the mails, is immaterial.'" *Talbott, supra,* at 195, *quoting United States* v. *Stull,* 521 F.2d 687, 689 (6th Cir. 1975), *cert. denied,* 423 U.S. 1059 (1976). Mr. Jenkins received the letter in question in March, 1975. (Tr. at 475; Exhibits App. at 110). At that time, Freeman ran the company. (Tr. at 867). He continued to be active on a regular basis after the sale of Century to Misters Powell and Wagner, completed May 14, 1975 (Tr. at 867; Exhibits App. at 329). The above is ample evidence that Freeman "caused" the letter to be mailed.

Freeman raises three more issues which may be dealt with briefly. First, he asserts that the trial judge committed prejudicial error by allowing a question and answer which informed the jury that Wagner had been indicted for activities concerning Century Consultants. Wagner was a co-defendant, but entered a plea of guilty before the trial began. In this same assignment of error, Freeman claims to have been prejudiced by the testimony of a witness that Powell had been "duped" when he bought Century from Freeman, and by questions during cross-examination concerning two civil cases bought against Freeman in 1964 and 1970. We agree with Judge Miles that "in neither case was the potentially prejudicial testimony allowed to proceed beyond the point at which the possible prejudice to defendant became evident, and in both these instances any prejudice to defendant was minimized by prompt remedial action." (Opinion and Order on Motion for New Trial, App. at 47; *see* Tr. at 1126-32; 1735-45.)

Second, Freeman asserts that the trial judge considered matters outside of the trial record when a directed motion for acquittal was denied. Specifically, the trial judge mentioned in his oral denial that:

> They [the Government witnesses] came as a result of ads in the papers or otherwise. Some of them came to an individual known as Angel or Angel Wilson, known to this Court as a person who has been convicted of a similar type of offense as that charged here, and in those

> instances, when they came to Angel Wilson, . . . they were routed to the defendants . . . .

(Tr. at 1052-53.) Judge Miles sets out his reasons for denying the motion for acquittal carefully and thoroughly in pages 1048 through 1055 of the Transcript. It is quite apparent that the reference to Mr. Wilson's past history with that court is merely made in passing and that Judge Miles did not rely on it in any way in making his ruling. It was clearly harmless error which did not affect any substantial rights of the defendant. Rule 52(a), F.R.Crim.P.

Third, the defendant complains that he should have been allowed to obtain credit reports on the government's witnesses in order to refute the suggestion that Century Consultants was the cause of their business failures. The rule for appellate review of discovery orders is:

> If the order is adverse to the defendant it may be reviewed on appeal after conviction, but the possibility of reversal is slight, since the courts hold that they must affirm unless the trial court abused its discretion and will not reverse if the court order was not prejudicial.

1 Wright, Federal Practice and Procedure § 261, p. 534, and cases cited therein (1969 & 1980 Cum. Supp.). Judge Miles denied the appellant's motion for the discovery order after carefully weighing the minimal, collateral relevance of the credit reports of the witnesses against the substantial privacy right of and potentially serious prejudice to the witnesses. (Tr. 28-31.) He did not abuse his discretion in such a ruling.

Finally, Freeman submitted to this Court a pro se brief attacking virtually every element of his conviction. We have considered the arguments presented therein and have concluded that appellant received a fair trial on all counts. Specifically, the Government presented sufficient evidence to establish intent to defraud, a conspiracy, and use of the mails; the trial court's denials of several motions for severance were

proper; the trial judge did not abuse his discretion in admitting evidence of the sale of stock; and the prosecutor did not go beyond the acceptable bounds of argument in his closing statement.

Accordingly, the conviction is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
OCT 1 1982
JOHN P. HEHMAN, Clerk

No. 80-1624

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

GURN H. FREEMAN,

Defendant-Appellant.

Before: LIVELY, KEITH and MERRITT, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Western District of Michigan.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Michigan and was argued by Gurn Freeman for appellant, Phillip Morse for appellee.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs taxed.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

Clerk

Issued as Mandate: NOVEMBER 29, 1982

COSTS: NONE

Filing fee.....$
Printing $

Total $

A True Copy.
Attest:

Deputy Clerk

No. 80-1624

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED

NOV 24 1982

JOHN P. HEHMAN, Clerk

UNITED STATES OF AMERICA, Plaintiff-Appellee	
v.	ORDER DENYING PETITION FOR REHEARING EN BANC
GURN H. FREEMAN, Defendant-Appellant	

Before: LIVELY, KEITH and MERRITT, Circuit Judges

A majority of the court having not voted in favor of an en banc rehearing, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk

(2 b)

No. 80-1624

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED

DEC 9 1982

JOHN P. HEHMAN, Clerk

UNITED STATES OF AMERICA, Plaintiff-Appellee v. GURN H. FREEMAN, Defendant-Appellant	ORDER DENYING PETITION FOR REHEARING EN BANC

Before: LIVELY, KEITH and MERRITT, Circuit Judges

A majority of the court having not voted in favor of an en banc rehearing, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk

(3 b)

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

April 18, 1983

Mr. Gerald D. Freeman
4755 North Washtenaw
Chicago, IL 60625

Re: Gurn M. Freeman,
v. United States
No. 82-1176

Dear Mr. Freeman:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Very truly yours,

Alexander L. Stevas, Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

June 13, 1983

Mr. Gerald D. Freeman
4755 North Washtenaw
Chicago, IL 60625

Re: Gurn M. Freeman,
v. United States
No. 82-1376

Dear Mr. Freeman:

The Court today entered the following order in the above entitled case:

The petition for rehearing is denied.

Very truly yours,

Alexander L. Stevas, Clerk

Alexander L. Stevas

APPENDIX C

UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

- - - - - - - -

UNITED STATES OF AMERICA,
Plaintiff,
vs.
GURN H. FREEMAN, SR.,
THOMAS C. WAGNER,
W. ELLIS POWELL,
Defendants.

No. GR-15 Cr. 1

INDICTMENT

Benjamin F. Gibson

The Grand Jury Charges:

Count 1

1. That commencing on or about January 1, 1974, and continuing up to March 2, 1977, in the Western District of Michigan and elsewhere,

GURN H. FREEMAN, SR.
THOMAS C. WAGNER
W. ELLIS POWELL

defendants herein, did devise and intend to devise a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises from various individuals and business entities, including but not limited to:

Richard L. Herbert	dba	Spoiled Rotten, Inc. East Lansing, Michigan
Richard H. Jenkins	dba	Millet Die Co., Inc. Lansing, Michigan
Henry Clark, et al	dba	Frank Clark & Associates Grand Rapids, Michigan
Robert W. Alexander	dba	Video Communications, Inc. Lansing, Michigan

Roger L. Green, et al	dba	R & K Fabrication Inc. Hastings, Michigan
Gordon B. Webster	dba	Sleepy Hollow Shopping Center Laingsburg, Michigan
Willis E. Morgan	dba	Ameripark, Inc. Grand Rapids, Michigan
Ralph J. Erbe	dba	Modular Crafts Inc. Union, Michigan
James L. Edleman	dba	North American Photo Inc. Dearborn, Michigan
Ronald H. Bosse	dba	De Ro Na, Inc. McHenry, Illinois
Roger A. Dawson	dba	Wesbanque Developments Cedar Falls, Iowa
Robert W. Raleigh, Jr., et al	dba	Crown Roofing Tile Co., Inc. Forreston, Illinois
Kenneth Susujara	dba	Thermwood Corp. Dale, Indiana
Frederick Boeldt	dba	Commerical Enterprises Development Sheboygan, Wisconsin

well knowing that the pretenses, representations and promises would be and were false when made, and which scheme and artifice was devised by the defendants in the manner and means as follows:

2. At all times material herein, the defendants

GURN H. FREEMAN, SR.
THOMAS C. WAGNER
W. ELLIS POWELL

held themselves out to be financial consultants and advisors of Century Consultants, Inc., Century Consultant Corp., and Century Consultants International (hereafter referred to as "Century Consultants").

3. At all times material herein, the defendants,

GURN H. FREEMAN, SR.
THOMAS C. WAGNER
W. ELLIS POWELL

purported business activities were to provide financial

counseling and to produce a written business plan for the stated purpose of obtaining financing for their clients' business endeavors.

4. It was part of the scheme and artifice to defraud and to obtain money, and property by means of false and fraudulent pretenses, representations and promises, and to effect the objectives thereof that, the defendants,

GURN H. FREEMAN, SR.
THOMAS C. WAGNER
W. ELLIS POWELL

would hold meetings with various individuals and business owners during which defendants represented that they were agents of Century Consultants;

(a) that they were successful in obtaining funding for numerous previous clients;

(b) that Century Consultants had numerous sources of funding which had funded previous clients;

(c) that defendants dealt with said sources on a continuing basis;

(d) that these sources were confidential and therefore could not be divulged to the clients until the time funding was actually arranged;

(e) that the sources for funding included, but were not limited to, private investors, banks, insurance companies, and pension funds;

(f) that the Defendants would prepare a business plan for each client which would show what methods of funding Century Consultants would use to obtain funding for the client.

5. It was a further part of the scheme and artifice to defraud and to obtain money, and property by means of false and fraudulent pretenses, representatiions and promises,

and to effect the objectives thereof that, the defendants,

GURN E. FREEMAN, SR.
THOMAS C. WAGNER
W. ELLIS POWELL

would represent to clients that they must be accepted by the "New Client Committee" before they would begin preparing the business plans, thereby lulling the clients into believing that their particular business venture would be funded through Century Consultants' sources if they were accepted as clients.

6. It was a further part of the scheme and artifice to defraud and to obtain money, and property by means of false and fraudulent pretenses, representations and promises and to effect the objectives thereof that after lulling clients into believing that Century Consultants' sources would provide funding, the defendants

GURN E. FREEMAN, SR.
THOMAS C. WAGNER
W. ELLIS POWELL

would inform the clients that a certain amount of "seed capital" would have to be raised from the clients' own sources and that it would have to be paid to Century Consultants for fees in order to continue work on arranging the majority of the financing, knowing at the time that the clients would ultimately have to obtain the entire financing from their own sources because in truth and fact Century Consultants had no sources of funding.

7. It was a further part of the scheme and artifice to defraud and to obtain money, and property by means of false and fraudulent pretenses, representations and promises and to effect the objectives thereof that the defendants

GURN E. FREEMAN, SR.
THOMAS C. WAGNER
W. ELLIS POWELL

did obtain financial statements and other documents from various individuals and business entities for the purpose of lulling them into a false sense of security by representing to them that such statements and documents were required and would be used to obtain financing for them through Century Consultants' sources, when in truth and fact as the Defendants then well knew, the clients were to obtain their own financing through their own sources.

8. It was a further part of the scheme and artifice to defraud and to obtain money, and property by means of false and fraudulent pretenses, representations and promises and to effect the objectives thereof that the defendants

GURN H. FREEMAN, SR.
THOMAS C. WAGNER
W. ELLIS POWELL

would and did retain for their own use and benefit the money obtained from the said various individuals and business entities and would not and did not perform the services promised to be performed in behalf of the said various individuals and business entities.

9. That on or about March 14, 1975, in the Western District of Michigan, Southern Division,

GURN H. FREEMAN, SR.
THOMAS C. WAGNER
W. ELLIS POWELL

the defendants herein, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, did knowingly cause to be delivered by mail, according to the direction thereon, a letter addressed to Mr. Richard H. Jenkins, Millett Die Co., Inc., 5320 Lansing Road, Lansing, Michigan 48917, from Century Consultants, Inc., W. Ellis Powell.

18 U.S.C. § 1341
18 U.S.C. § 2(a)

Count 2

1. The Grand Jury realleges and incorporates by reference herein, all paragraphs of Count 1 of this indictment, excepting the last paragraph thereof, as constituting a scheme and artifice to defraud, and further alleges:

2. That on or about March 3, 1975,

GURN H. FREEMAN, SR.
and
THOMAS C. WAGNER

the defendants herein, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, did knowlingly cause to be delivered by mail, according to the direction thereon, a statement addressed to Mr. Richard L. Herbert, Spoiled Rotten, Inc., 1071 Trowbridge Road, East Lansing, Michigan 48823, from Century Consultants, Inc.

18 U.S.C. § 1341
18 U.S.C. § 2(a)

Count 3

1. The Grand Jury realleges and incorporates by reference herein, all paragraphs of Count 1 of this indictment, excepting the last paragraph thereof, as constituting a scheme and artifice to defraud, and further alleges:

2. That on or about April 1, 1975,

GUEN H. FREEMAN, SR.
and
THOMAS C. WAGNER

the defendants herein, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, did knowlingly cause to be delivered by mail, according to the direction thereon, a statement addressed to Messrs. Frank F. Clark and Henry T. Clark, Claire Rapids Companies, Inc., 1945 28th Street, S.W., Wyoming, Michigan 49509, from Century Consultants.

18 U.S.C. § 1341
18 U.S.C. § 2(a)

Count 4

1. The Grand Jury realleges and incorporates by reference herein, all paragraphs of Count 1 of this indictment, excepting the last paragraph thereof, as constituting a scheme and artifice to defraud, and further alleges:

2. That on or about May 5, 1975,

GURN H. FREEMAN, SR.
and
THOMAS C. WAGNER

the defendant herein, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, did knowlingly cause to be delivered by mail, according to direction thereon, a statement addressed to Messrs. Frank F. Clark and Henry T. Clark, Claire Rapids Companies, Inc., 1945 28th Street, S.W., Wyoming, Michigan 49509, from Century Consultants.

18 U.S.C. 1341
18 U.S.C. 2(a)

Count 5

1. The Grand Jury realleges and incorporates by reference herein, all paragraphs of Count 1 of this indictment, excepting the last paragraph thereof, as constituting a scheme and artifice to defraud, and further alleges:

2. That on or about December 24, 1976,

GURN E. FREEMAN, SR.
THOMAS C. WAGNER
and
W. ELLIS POWELL

the defendants herein, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, did cause to be transmitted in interstate commerce by means of a wire communication, that is, a teletype between Lansing, in the State of Michigan, and Des Plaines in the State of Illinois, certain signs, signals and sounds, for the purpose of transferring funds and for the purpose of executing and concealing the aforesaid scheme and artifice to defraud.

18 U.S.C. § 1343
18 U.S.C. § 2(a)

Count 6

1. The Grand Jury realleges and incorporates by reference herein, all paragraphs of Count 1 of this indictment, excepting the last paragraph thereof, as constituting a scheme and artifice to defraud, and further alleges:

2. That on or about January 26, 1977,

GURN E. FREEMAN, SR
THOMAS C. WAGNER
and
W. ELLIS POWELL

the defendants herein, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, did cause to be transmitted in interstate commerce by means of a wire communication, that is, a teletype between Lansing, in the State of Michigan, and Des Plaines, in the State of Illinois, certain signs, signals and sounds, for the purpose of transferring funds and for the purpose of executing and concealing the aforesaid scheme and artifice to defraud.

18 U.S.C. §1343
18 U.S.C. § 2(a)

Count 7

1. The Grand Jury realleges and incorporates by reference herein, all paragraphs of Count 1 of this indictment, excepting the last paragraph thereof, as constituting a scheme and artifice to defraud, and further alleges:

2. That on or about May 30, 1975, in the Western District of Michigan, Southern Division,

GURN H. FREEMAN, SR.
THOMAS C. WAGNER
and
W. ELLIS POWELL

the defendants herein, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so did knowingly transport and cause to be transported in interstate commerce securities of the value of $5,000.00 or more, to wit: a check drawn on the Michigan National Bank, Lansing, Michigan, in the amount of Seven Thousand Five Hundred Dollars ($7,500.00), knowing the same to have been taken by fraud.

18 U.S.C. § 2314
18 U.S.C. § 2(a)

Count 8

1. The Grand Jury realleges and incorporates by reference herein, all paragraphs of Count 1 of this indictment, excepting the last paragraph thereof, as constituting a scheme and artifice to defraud, and further alleges:

2. That commencing on our about January 1, 1974, and continuing up to and including March 2, 1977, in the Western District of Michigan, and elsewhere,

GURN E. FREEMAN, SR.
THOMAS C. WAGNER
and
W. ELLIS POWELL

the defendants herein, did knowingly, willfully and unlawfully combine, conspire and agree together to commit the following offenses against the United States; that is, (A) to knowingly and willfully use and cause to be used the United States mails; (B) to knowingly and willfully cause to be transmitted a teletype in interstate commerce by means of a wire communication; and (C) to knowingly transport and cause to be transported in interstate commerce securities of the value of $5,000.00 or more to be used in furtherance of a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises from various individuals and business entities, including but not limited to those individuals and business activities listed in paragraph 1 of Count 1 of this indictment, well knowing that the pretenses, representations and promises would be and were false when made, and which scheme and artifice was devised by the defendants in the manner and means as set forth in paragraphs two through eight, inclusive, of Count 1 of this indictment which are incorporated by reference as if duly set forh herein, in violation of Title 18 U.S.C. §§ 1341 and 2(a), Title 18 U.S.C. §§ 1343 and 2(a), and Title 18 U.S.C. §§ 2314 and 2(a).

12c)

3. In furtherance of the conspiracy and to effect the objects thereof,

GURN H. FREEMAN, SR
THOMAS C. WAGNER
and
W. ELLIS POWELL

the defendants herein, did and caused to be done the acts set forth in Counts 1 through 8, inclusive, of this indictment, on the dates, at the places, and in the manner set forth, all of which are set forth and incorporated by reference herein as separate and distinct overt acts.

OVERT ACTS

4. In addition to the foregoing, in furtherance of the conspiracy, and to effect the objects thereof, the defendants herein committed, among others, the additional following overt acts:

(a) On or about July 12, 1974, GURN H. FREEMAN, SR. caused to be delivered by mail according to the directions thereon an envelope containing memorandum generally outlining the proposed business financing plans and requesting a $5,000.00 retainer, to Mr. Ralph Erbe, Modular Crafts, Inc., Union, Michigan 49130.

(b) On or about November 12, 1975, THOMAS C. WAGNER caused to be delivered by mail according to the directions thereon an envelope containing a business plan generally outlining the proposed financing plans and requesting a $2,500.00 retainer fee to Mr. Roger Dawson, 3118 Pridemole Drive, Cedar Falls, Iowa 50613.

(c) On or about September 29, 1976, THOMAS C. WAGNER caused to be placed in an authorized depository for mail matter an envelope containing a check in the amount of $1,500.00 from Mr. Ronald Bosse, 3415 N. Riverside Dr., McHenry, Illinois 60050, addressed to Century Consultants, 1400 E. Touhy Ave., Des Plains, Illinois 60018.

(d) On or about January 26, 1976, W. ELLIS POWELL advised Mr. Ray Quasius, Jr., 1716 N. 16th Street, Sheboygan, Wisconsin, that the money to fund the building of a bowling lanes in Sheboygan, Wisconsin was forthcoming.

18 U.S.C. §371
18 U.S.C. § 2(a)

A TRUE BILL

Foreman

LOUIS S. BRADY
United States Attorney